FOR ARGUMENT

In the Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 76-1040.

THOMAS SANABRIA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Reply Brief for the Petitioner.

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REPLY BRIEF FOR THE PETITIONER

I. THE DECISION WHICH THE GOVERNMENT SOUGHT TO APPEAL WAS THE JUDGMENT TERMINATING THE PROSECUTION AGAINST THE PETITIONER. THAT JUDGMENT WAS AN ACQUITTAL IN SUBSTANCE AS WELL AS FORM. THEREFORE, THE FIRST CIRCUIT WAS DEPRIVED OF APPELLATE JURISDICTION BY THE DOUBLE JEOPARDY CLAUSE.

The Government concedes that the Double Jeopardy Clause forbids a second trial

after a defendant has been acquitted. Govt. Br. 9. The Government also concedes that the test of an acquittal is whether it "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." Govt. Br. 25-26 (quoting Lee v. United States, 97 S.Ct. 2141, 2146 n. 8 (1977)). But the Government utterly fails to confront the question of whether the judgment rendered by the district court was an acquittal under this test. Instead, the Government focuses exclusively on whether the district court's mid-trial ruling excluding numbers evidence was an acquittal. Govt. Br. 26. That, however, is not the issue because as petitioner emphasized in his brief (at p. 21), the district court's ruling on the evidence of numbers activity did not constitute a dismissal of the indictment or otherwise terminate the prosecution against him.[1/] Before the district court could

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1/ In seeking to respond to petitioner's argument that the Government's appeal was barred by that portion of 18 U.S.C. §3731 which prohibits Government appeals from

(cont.)

terminate the prosecution against the petitioner it had to take the further step of evaluating the remaining evidence in the case against the petitioner, and resolving "factual elements of the offense charged." It was only after the district court had evaluated this evidence and found it to be factually insufficient, that it directed the entry of final judgment and it was only after the entry of that judgment that the Government sought to appeal. Because

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1/ cont.

evidentiary rulings made after the attachment of jeopardy, the Government emphasizes that it did not seek to appeal during trial. Govt. Br. 17. Nevertheless, the Government persists in regarding the district court's ruling excluding numbers evidence in isolation, as if it had sought to appeal from that ruling during trial. The Government cannot have it both ways. If it is claiming, as it must, that it sought to appeal from the judgment "terminating the prosecution," it must confront the whole judgment and not slice it up to suit its convenience.

that final judgment was an acquittal in substance as well as form, the First Circuit lacked appellate jurisdiction and its decision must be vacated. United States v. Martin Linen Supply Co., 97 S.Ct. 1349, 1354 (1977).

II. THE JUDGMENT OF ACQUITTAL DISCHARGED PETITIONER OF THE CRIME OF ENGAGING IN AN ILLEGAL GAMBLING BUSINESS. FURTHER PROSECUTION ON THE BASIS OF NUMBERS EVIDENCE IS BARRED BECAUSE IT WOULD BE PROSECUTION FOR "THE SAME OFFENSE" OF WHICH PETITIONER WAS ACQUITTED.

A. The Government's Reliance on a Hypothetical Two-Count Indictment Is Misplaced.

The Government concedes that the indictment charges petitioner with a single federal crime, engaging in an illegal gambling business, and that numbers betting and horse betting were "simply two components of the same offense." Govt. Br. 11, 31-32. Nevertheless, the Government seeks to avoid the inevitable consequence of this concession -- that a second trial of petitioner is constitu-

tionally barred -- by arguing that

> "each theory of criminal liability would have been the basis of a separate count of the indictment. If petitioner had been charged in two courts with (1) conducting a horse betting gambling ring, and (2) conducting a numbers betting gambling ring, the proper resolution of this case would be apparent. The district court would have entered two separate judgments, one acquitting petitioner of the horse betting offense and the other dismissing the numbers indictment because it was defective on its face." Govt. Br. 10-11.

1. The Defendant's Rights Must Be Determined on the Basis of What Happened, Not What Might Have Happened.

The short answer to this argument, like the short answer to similar speculation by the court of appeals (see Pet. Br. 38-40), is that how the indictment could have been drafted and what the district court would have done, have nothing to do with this case. The Government seems to forget that that precise wording of an indictment is extremely important in guaranteeing to a

defendant (a) that he will not be prosecuted for a federal felony except on the finding of a grand jury -- Stirone v. United States, 361 U.S. 212 (1960); (b) that he will not be convicted for a crime of which he has not been charged -- Cole v. Arkansas, 333 U.S. 196 (1948); (c) that he will receive adequate notice of the charges against him to prepare his defense -- Russell v. United States, 369 U.S. 749, 763-764 (1962); and (d) that the offense will be described with sufficient precision to enable him to assert the defense of double jeopardy in the event he is later prosecuted for a similar offense -- Russell v. United States, supra.

The Government also seems to forget the adversary nature of an indictment. Such matters as whether a defendant is charged under a one-count, two-count, or ten-count indictment are important strategical decisions over which the Government has complete control -- subject only to the right of a grand jury to approve or disapprove the final product. A criminal defendant has no input into the drafting of the

accusatory instrument against him, and there is no reason why the Government should not be compelled to accept the consequences of its own draftsmanship. Indeed, especially considering that a criminal defendant is bound by his own strategical decisions, the adversary system requires nothing less.

2. Even in the Government's Hypothetical, the Double Jeopardy Clause Would Still Foreclose Further Prosecution.

The second answer to the Government's argument is that even if it had prosecuted petitioner in a two-count indictment, it would still face the same problems it faces here. The only state statute cited in the actual one-count indictment was Mass. G.L. c. 217 §17. Thus, for the Government's hypothetical to be at all faithful to the present case, this would also be the only state statute cited in each count of the hypothetical two-count indictment. The first count would cite Mass. G.L. c. 217 §17 and refer in words to betting "on the

result of a trial and contest of skill, speed, and endurance of beast," while the second count would cite the same state statute and refer in words to betting "on a parimutuel numbers pool." The petitioner would go to trial on both counts, and would move at the close of the Government's case to exclude the evidence of numbers betting as to both counts on the ground that both counts were in fact horse betting counts because of the citation of Mass. G.L. c. 217 §17. The district court would then exclude the numbers evidence, as it did here, and enter a judgment of acquittal on both counts.

In sum, imagining that the indictment had been brought in two counts does not solve the Government's irreducible problem: the fact that petitioner was acquitted of the offense for which the Government now seeks to prosecute him.

B. The Petitioner Did Not Waive His Double Jeopardy Claims.

1. Petitioner did not have a "legal defense" to the indictment and, therefore, cannot be deemed to

have "submitted himself to an unnecessary jeopardy."

The Government concedes that the indictment against petitioner was legally sufficient and not vulnerable to a pretrial motion to dismiss for failure to state an offense. Govt. Br. 37 n. 23. Consequently, the Government also concedes that petitioner's "objection" to the indictment was not formally waived by his failure to assert it prior to trial. Id. Further, the Government concedes, and in so conceding tacitly confesses error in the decision of the court of appeals, that the indictment was not duplicitous. Govt. Br. 15 n. 8. Nevertheless, despite these concessions, the Government chastizes petitioner for failing to raise his "objection to the indictment" prior to trial and for "subject[ing] himself to an unnecessary jeopardy." Govt. Br. 12-13, 36-43.

The contradiction in the Government's position is apparent. On the one hand, the Government acknowledges that the indictment was legally sufficient, that it could not have been dismissed for failure to state an

offense, and that it irresistably placed the petitioner in jeopardy on the charge of engaging in an illegal gambling business. On the other hand, the Government attacks petitioner for failing to assert his "objection" to the indictment prior to trial and for submitting himself to an "unnecessary" jeopardy. Significantly, the Government nowhere in its brief describes the type of motion petitioner could have brought prior to trial to assert his "objection." Petitioner submits that this failure is no accident. The Government cannot describe the type of pretrial motion the petitioner could have made to assert his "objection to the indictment" because the petitioner's so-called "objection to the indictment" was not an "objection to the indictment" at all. It was rather a motion to strike numbers evidence on the ground that this evidence was irrelevant given the way that the indictment had been drafted. Such a motion to strike is properly made during trial.

2. The Government's position on waiver would impose on the criminal defendant an unconstitutional burden to help the Government improve its case against him.

Indeed, the Government's position represents an attempt to place on the criminal defendant an unprecedented burden. The Government concedes that the indictment validly charged the crime the Government intended to charge. The only thing the indictment did not do was to charge the crime in precisely the manner in which the Government would, in retrospect, have wanted to charge it. Thus, in asserting that the defendant should have pointed this out to the Government, the Government is asserting nothing less than that a criminal defendant is obligated to assist the Government in improving the case against him. Such a proposition flies in the face of our adversary system of criminal justice (cf. Mullaney v. Wilbur, 421 U.S. 684 (1975); In re Winship, 397 U.S. 358 (1970)), and encroaches upon the defendant's privilege against self-incrimination (cf. Leary v. United

States, 395 U.S. 6 (1969); Marchetti v. United States, 390 U.S. 39 (1968)). This becomes particularly apparent when one considers that in order to determine whether an indictment charges him of a crime in the manner the Government intended, a criminal defendant may well have to rely on his own knowledge of the evidence against him. Here petitioner was tried with ten codefendants, all of whom were convicted exclusively on the basis of horse betting evidence. Presumably if the horse betting evidence against petitioner had been overwhelming, and the evidence of numbers betting non-existent, he would have had no obligation to assert a pretrial "objection to the indictment." Thus, the inevitable result of the Government's position is not only that a criminal defendant must help the Government improve its case, but that he must do so on the basis of his own knowledge of the evidence against him. This would plainly be a violation of the privilege against self-incrimination.

3. Jeffers v. United States is plainly distinguishable.

In Jeffers v. United States, 97 S.Ct. 2207 (1977), the defendant was named in two indictments, one charging him with conspiracy to violate the narcotics laws in violation of 21 U.S.C. §846, the other charging him with conducting a continuing criminal enterprise in violation of 21 U.S.C. §848. Eight members of the Court held that the conspiracy was a lesser included offense of the continuing criminal enterprise. Consequently, the Court ruled that the crimes should have been prosecuted simultaneously and that the double jeopardy clause would ordinarily bar successive trials. This Court divided, however, on whether the successive trials against Jeffers constituted a violation of his constitutional rights in light of the fact that Jeffers had specifically and successfully opposed the Government's motion to have a joint trial of the two indictments. Four members of the Court found that Jeffers' opposition to the motion for joint trial constituted a waiver of his double jeopardy claim against suc-

cessive prosecutions. And four members of the Court found that it did not constitute such a waiver.

Petitioner maintains that there was no waiver in Jeffers but that, in any case, the Court does not need to confront that issue here because the present case is plainly distinguishable. In Jeffers, the Justices opposing a finding of waiver observed:

> "Most trial lawyers will be startled to learn that a rather routine joint opposition to that motion to consolidate has resulted in the loss of what this Court used to regard as 'a vital safeguard in our society, one that was dearly won, one that should continue to be highly valued'...." 97 S.Ct. at 2220.

This observation applies here a fortiori. It is one thing to say that a defendant waives his constitutional right against successive trials when he specifically and successfully opposes a consolidated trial. It is quite another to say, as the Government does here, that a defendant waives that right merely by moving to strike evidence. Indeed, the acceptance of such a

proposition, especially when coupled with the Government's claim that it has the right to appeal from the dismissal of any "discrete basis of criminal liability," would result in the virtual elimination of the constitutional protection against successive prosecutions. This is because, as pointed out at page 13 of petitioner's principal brief, practically every decision excluding evidence can be characterized as a dismissal of a discrete basis of criminal liability. Therefore, if as the Government contends, a motion to exclude evidence constituting "a discrete basis of criminal liability" is a waiver of the right against successive prosecution on that basis of liability, the constitutional guarantee of the finality of acquittals and the constitutional protection against successive prosecutions are all but destroyed.

Conclusion

The judgment of the court of appeals should be vacated and the case remanded to that court with a direction that the Govern-

ment's appeal be dismissed for lack of appellate jurisdiction, and with a further direction that petitioner not be retried for violating 18 U.S.C. §1955 on the basis of numbers evidence, or, for that matter, on any other basis.

Respectfully submitted,

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